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80-2013
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MICHAEL HENDERSON,
Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

1. Whether the arrest of the defendant was illegal and subsequent statements made by him and all evidence seized should have been suppressed.

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OPINION BELOW

The opinion of the Court of Appeals (Pet. No. 80-1790 App. A-1 to A-5) is not yet reported in an official reporter. (Attached)

JURISDICTION

The judgment of the Court of Appeals was entered on April 8, 1981. Jurisdiction of this Court is invoked under 21 U.S.C. 841(a)(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted on one count of knowingly and intentionally possessing with intent to distribute cocaine in violation of 21 U.S.C., §841(a)(1). The defendant was sentenced to twelve years to be followed by a six year special parole term. The Court of Appeals affirmed.

At trial during preliminary matters, the trial court affirmed the Magistrate's ruling on all pre-trial motions. Attorney for the defendant renewed the defendant's Motions to Suppress and for an Order *In Limine,* and the Court denied both.

St. Louis police officer, Peter Gober, testified that on March 28, 1980, he obtained search warrants for 5108 Wallingford, and 1632 Rudelle, both in St. Louis. After surveillance with other officers at 5108 Wallingford, he and Detective Ken Dye followed an individual who got into a 1972 Gremlin, which had been parked at the residence. Detectives in another car eventually pulled the Gremlin over after putting a red light on their dashboard. Gober testified a Detective Mokwa arrested Michael Henderson after pulling him over and after searching Henderson's pockets and finding a small bag of white powder. Gober testified on the way back to 5108 Wallingford, Henderson told Gober that he would give him what he wanted. Upon arrival at 5108 Wallingford, Gober went to the upstairs of the house to advise Mamie White and Bonnie Pride that a search warrant was to be executed upon the house. Gober testified he took no part in the seizure of any evidence, as he had turned Henderson over to Detective Hegger prior to the search. Gober testified that Henderson made admissions against interest while en route to executing the other warrant for 1632 Rudelle.

On cross-examination Gober stated that the individual who got into the Gremlin was followed in order to be identified. After the arrest, no officer asked Henderson for his driver's license. On recross, Gober admitted that the car was registered to Milton Henderson.

Officer Joseph Mokwa testified on March 28, 1980, he was on surveillance at 5108 Wallingford. After following a black man who exited the residence and drove away in a beige Gremlin, Mokwa stated he engaged a red light in his car, and stopped the Gremlin. After the subject got out of his car, he was arrested and searched. After Henderson was brought back to 5108 Wallingford, Mokwa took no part in the seizure of evidence.

Officer Harry Hegger testified on March 28, 1980, a search warrant was executed on 5108 Wallingford. Hegger testified the defendant said he would show them what they wanted. Hegger testified the defendant showed them a shoulder bag in the basement, and told them it contained seven ounces. Investigation revealed that the bag did contain cocaine. Hegger thereupon seized the bag and its contents. Hegger also seized a scale, a strainer, and a spatula in the basement of the house. Hegger stated Henderson told the officers he had some money he wanted to take with him in order to make bond. Hegger found a box which had $17,640.00 U.S. currency, a calculator and other items.

On cross, Hegger stated Henderson was stopped in order to ask him to come to the house to execute the search warrant. Hegger testified none of the items taken from the residence were tested, nor showed any of the defendant's fingerprints.

Mamie White, who resided at 5108 Wallingford, testified that she, along with her sister, owned the house. Miss White testified she or her sister, who also lives at the house, wash clothes every day in the basement because of an invalid mother. White testified she had never seen the scale and other items portrayed as being on the washer and dryer. She testified she had been in the basement in the afternoon of March 28, and did not observe any of the items which were offered into evidence.

The defendant testified he lived at 7712 Dale Avenue in St. Louis. The automobile he was driving when stopped was registered to his brother, Milton. After being stopped, Hender-

son stated one of the men came to the car and pointed a gun at his head while the other man pulled him out of the car and handcuffed him. Henderson testified the shirt he had on had no breast pocket. Henderson testified that after being brought to 5108 Wallingford, he was thrown about the room, and one man lifted him off the floor with his gun barrel. Henderson testified his driver's license was on his person at the time he was stopped in his car. The defendant identified exhibit 2 as his tennis bag used for carrying his tennis gear. The defendant testified the grey box was owned by his brother, Milton, but that he had never seen any of the other Government exhibits.

Henderson testified he did not show the officers where the box was hidden. He stated he did not give any policeman the key to the box. At the time he was stopped in his car, Henderson testified he had no cocaine on his person. The defendant testified he made no admissions to the officers the night of his arrest.

Officer Kenneth Dye was called by the Government in rebuttal and testified in conformity with the other officers. After closing arguments by both counsel, the Court read the jury instructions. After deliberation, the jury returned a verdict of guilty.

ARGUMENT

1. The Court Erred In Not Suppressing Statements Made By The Defendant, And The Evidence Seized At The Defendant's Arrest Was Illegal.

At the pre-trial motion hearing, Officer Gober testified that on March 28, the defendant was stopped while driving an automobile. Officer Gober testified he had no search warrant for the car. Officer Gober testified that the defendant got out of the car, and the police noticed a baggie sticking out of his jacket pocket, which they suspected to be marijuana. The defendant was arrested and searched, and a small baggie of white powder was found on his person. After the defendant was placed in custody, it was alleged that the defendant made several admissions against interest.

At trial, Officer Gober testified they had no reason to stop the defendant other than to ask him to accompany the officers back to the house at 5108 Wallingford. Officer Gober testified the defendant had violated no traffic law, nor was he pulled over because of any suspected traffic violation. It is asserted by the appellant that the arrest of the defendant was illegal, as was the search of his person at 5108 Wallingford, and the evidence thereby seized should have been suppressed along with the statements the defendant was alleged to have made.

Initially, it should be noted that the question of the validity of an arrest without a warrant by state officers for violation of federal law is to be determined by state law. *U. S.* v. *Sims,* (D.C.Md. 1964), 231 F.Supp. 251. Equally clear is that evidence and inculpatory statements which were products of an illegal arrest should be suppressed. *U. S.* v. *Strickland,* (C.A.Cal. 1974), 490 F.2d 378. The question is, therefore, under the law was the defendant's arrest an illegal arrest.

When an arrest is made of an individual without an arrest warrant, it is presumed to be unlawful. *Nelson* v. *R. H. Macy &*

Co., (App., 1968), 434 S.W.2d 767. For a warrantless arrest to be lawful, it must be based upon probable cause. *State* v. *Wiley*, (Sup. 1975), 522 S.W.2d 281. Probable cause to arrest has been defined in many cases, but probable cause based on suspicion is not enough to justify a warrantless search. *State* v. *Grady*, (App. 1977), 548 S.W.2d 601. Probable cause has been most times, as in *State* v. *Craig*, (Sup. 1966), 406 S.W.2d 618, defined as a police officer believing that the defendant has been guilty of a recent felony.

In the case at bar, none of the officers testified that at the time of stopping the car the defendant had done anything wrong. Under the law of the State of Missouri, the officers had no right to stop the defendant. Even after the defendant was stopped, he was not even asked to show his driver's license, registration papers or title to the car, both of these being necessary for a legal arrest of a motorist.

It is anticipated the Government may assert the defendant was not "arrested", he was merely stopped. This is not the law in Missouri. When a police officer takes charge and control of a person's movement, that person is under arrest. *State* v. *Abbot*, (App. 1976), 571 S.W.2d 809.

At the pre-trial hearing, Officer Gober testified on March 28, 1980, he and the other officers stopped Mr. Henderson to request he go with them when they executed the search warrant. He testified they were not to arrest him. It is asserted that under *Abbot, Id.*, the stopping of the defendant's vehicle was an arrest, and an illegal one. There was conflicting testimony as to what happened after the defendant was stopped. Officer Gober testified he and Officer Mokwa saw a bag of marijuana sticking out of the defendant's jacket. The defendant testified after stopping his car he was first pulled out of the car, handcuffed, and thrown on the trunk of the car. Incident to that, according to Officer Gober, the defendant was searched, and a bag analyzed as cocaine was found on his person.

Since the arrest was illegal, all of the evidence seized or obtained by the illegal arrest under the Exclusionary Rule and Fruit of the Poisonous Tree Doctrine should not have been allowed into evidence. *Mapp* v. *Ohio,* (1961), 367 U.S. 643, il S.Ct. 1684; *Wong Sun* v. *United States,* (1963), 371 U.S. 471, 83 S.Ct. 407. While it has been held that once a car has been legally stopped, facts may develop sufficient to grow into a probable cause for a search, if the arrest is illegal, all objects seized pursuant to it must be suppressed. *U. S.* v. *Whitlock,* (D.C.Mich. 1974), 418 F.Supp. 138. Irrespective of the officer's story that he saw a bag of marijuana sticking out of the defendant's pocket, under *State* v. *Herron,* (1977), 389 A.2d 728, when objects come in a plain view only after and as a result of an unlawful intrusion into a constitutionally protected zone, then evidence of such observation gathered should be suppressed. Finally, under Missouri law, a police officer may not arrest a person for investigation in order to afford the police an opportunity to gather facts sufficient to constitute probable cause. *State* v. *Howell,* (App. 1976), 543 S.W.2d 836; *State* v. *Hicks,* (Sup. 1974), 515 S.W.2d 518.

For all the reasons stated above, the arrest of the defendant was illegal, and all statements made by him, as well as evidence seized after the arrest, should have been suppressed.

CONCLUSION

It is respectfully submitted that the petitioner's Writ of Certiorari issue.

PAUL M. STORMENT, JR.
Attorney for defendant-appellant

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1790

United States of America,
Appellee,

v.

Michael David Henderson,
Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: February 13, 1981

Filed: April 8, 1981

Before ROSS, HENLEY and McMILLIAN, Circuit Judges.

HENLEY, Circuit Judge.

A grand jury charged appellant Henderson in a one count indictment of knowingly and intentionally possessing with intent to distribute approximately 189 grams of cocaine, in violation of 21 U.S.C. § 841(a)(1). Before trial, Henderson moved for the suppression of physical evidence and his own inculpatory statements, on the theory that these were fruits of an illegal arrest. The magistrate[1] recommended denying these motions, and the trial court[2] adopted this recommendation. At trial ap-

[1]The Honorable William S. Bahn, United States Magistrate.

[2]The Honorable H. Kenneth Wangelin, Chief Judge, United States District Court for the Eastern District of Missouri.

pellant's motions for directed verdict and judgment of acquittal were denied, and the jury returned a guilty verdict. Henderson received a twelve year sentence, to be followed by a special parole term of six years. He brings this timely appeal.

On March 28, 1980 a confidential source informed St. Louis police detectives that Henderson was using residences located at 5108 Wallingford and 1632 Ruedelle in St. Louis County to conduct cocaine distribution activities. On the basis of this information, police obtained search warrants for the two residences. Henderson does not challenge the validity of the warrants.

After obtaining the warrants, police and detectives went to 5108 Wallingford, and arrived at around 8:00 p.m. They observed a 1972 Gremlin in the driveway. The police had noticed the car before, and a check with the state department of revenue files had established that the car was registered to Michael David Henderson.

Instead of going in the house and conducting the search, the police waited for Henderson to exit. According to Detective Gober, the plan was for him to confirm the identity[1] of the driver as Michael Henderson, for police then to stop the car away from the residence, to inform Henderson of the existence of the search warrants, and to request his presence while the warrants were executed. Gober gave three reasons for the plan: to avoid destruction of property at the houses, to avoid destruction of the evidence sought, and to avoid violence. Police were aware that two women resided at 5108 Wallingford.

Henderson left the house at around 8:35 and drove away in the Gremlin. Gober identified the driver as Henderson. After Henderson had travelled about two to three miles, police were able to position cars so as to signal Henderson to stop with

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[1]Gober had a picture of Henderson; the two were not previously acquainted.

relative safety. Upon signal Henderson stopped and got out of his car.

According to police testimony, detectives Mokwa and Gober approached Henderson and told him that he had been stopped because detectives had a warrant to search 5108 Wallingford. The two detectives then noticed a plastic bag with a vegetable like substance protruding from Henderson's pocket, and they seized it and arrested Henderson for possession of marijuana. They then conducted a search of appellant's person and found a clear plastic bag containing white powder, which turned out to be cocaine.

Gober then informed Henderson of his *Miranda* rights, and Gober and another detective took Henderson to 5108 Wallingford. Henderson told the detectives the house belonged to "Mamie"; Gober then replied that there was a warrant nonetheless and they were looking for cocaine; and Henderson then said, "please don't scare the women there at the house, they're not involved in all of this, I'll give you what you want."

At the house, detective Hegger directed Henderson to the basement area, which was where the informant had specified that the drug activities took place. Henderson stated, "Before you start tearing the place up I'll show you what you're looking for." He directed Hegger to a brown shoulder bag, which contained cocaine and appellant's expired driver's license. Hegger next noticed drug paraphernalia on top of a washing machine. Appellant directed Hegger to a box of money, stating that he (appellant) wished to take it along for bond. Hegger opened the box and found $17,640.00, jewelry, a calculator, a list of names and numerical figures, and a safety inspection receipt. The shoulder bag and its contents, the drug paraphernalia, and the box and its contents (except the jewelry) were introduced into evidence at trial.[4]

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[4]The police also searched the house at 1632 Ruedelle, but found no cocaine there.

At trial Henderson testified that one policeman pulled a gun after stopping him, and another handcuffed him. He further testified that the police threw him around the room at the house. He denied showing the officers the leather bag or the box.

On appeal Henderson contends first that the stop of his car was illegal, and that therefore his inculpatory statements and all physical evidence seized should have been suppressed. He also contends that the evidence was insufficient to sustain the verdict.

At the suppression hearing only police officers testified, not Henderson. The magistrate credited the police testimony. For purposes of this appeal, we accept his findings of fact that the stop of appellant and discovery of drugs on his person occurred essentially the way the police testified. Thus, there is no question but that the police officers properly arrested appellant once they observed the marijuana. The question is whether the initial stop was valid.

In *Terry* v. *Ohio*, 392 U.S. 1 (1968), the Supreme Court held that the fourth amendment protections apply to a "stop and frisk" situation which is less than a complete arrest, and that the constitutionality of the stop and frisk depends upon the reasonableness of the police conduct in the circumstances:

> [I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts reasonably warrant that intrusion . . . [I]t is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?

Id. at 21-22 (footnotes omitted).

In *Brown* v. *Texas,* 443 U.S. 47 (1979), the Supreme Court also considered the constitutionality of an investigative stop. There the Court stated that in such cases a court should weigh "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Id.* at 51.

We think that under the reasoning of *Terry* v. *Ohio, supra,* and *Brown* v. *Texas, supra,* the stop in the instant case fully comports with the requirements of the fourth amendment. First, the police had the information that Henderson was conducting drug activities at 5108 Wallingford, and they identified him as the person who left that house. Secondly, the stop itself was a minimal intrusion. At the time the police officers stopped Henderson, they intended only to inform him of the search warrants and to request his presence during the searches. Finally, the police plan was reasonable. If Henderson refused to accompany them, then they were in no worse position to conduct the searches. If he did consent to accompany them, then the possibilities of violence and destruction of the evidence would be avoided.

Henderson also contends that the evidence was insufficient to support the verdict. We find this contention to be without merit. The detectives seized a substantial quantity of cocaine, and it was Henderson who showed them where it was.

The judgment of the district court is affirmed.

A true copy.

Attest:

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted of possession of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1). He was sentenced to twelve years' imprisonment and six years' special parole. The court of appeals affirmed (Pet. App. A-1 to A-5).

After the government waived its right to file a response to the petition in this case, the United States Attorney informed the Solicitor General that on May 26, 1981, petitioner failed to surrender himself to the proper authorities as ordered by the United States District Court for the Eastern District of Missouri. On the same date, a bench warrant was issued for his arrest. Given petitioner's present fugitive status, further review is not warranted. See *Molinaro* v. *New Jersey*, 396 U.S. 365 (1970).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JUNE 1981

DOJ-1981-06